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No. 74-1357

In the Supreme Court of the United States

OCTOBER TERM, 1974

JULIUS WILKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that evidence introduced against him at trial should have been suppressed because it was the fruit of a warrantless search which petitioner claims was invalid because probable cause for the search was in part predicated upon information obtained from a co-defendant's seven-year-old child. He also contends that allegedly prejudicial remarks in the prosecutor's closing argument require reversal.

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of having conspired to possess and distribute heroin in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to twelve years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. A; *United States* v. *Hill*, 508 F.2d 345).

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[1]Also convicted were co-defendants Clarence Hill and Clarence Diggs.

The evidence showed that between October 1971 and February 1972, petitioner, co-defendants Clarence Diggs, and Clarence Hill and unindicted co-conspirators Barbara Smith, and Joyce Picard arranged for and effected the transportation of heroin from New York City to New Orleans. Together with Cora Virgil (another unindicted co-conspirator), they spent the next two weeks repacking 100 bundles of heroin into more than 4,000 glassine envelopes. On July 1, 1972, agents of the Bureau of Narcotics and Dangerous Drugs (BNDD) seized 42 bundles of heroin, $17,991 in cash and a gun from Clarence Hill's home and automobile.

1. On July 1, 1972, agents of the Bureau of Narcotics and Dangerous Drugs executed a search warrant at the home of co-defendant Clarence Hill (Tr. 220). While federal agents were searching Hill's house, New Orleans police searching the backyard met and spoke with Hill's seven-year-old son at the back of the house away from his parents. The boy was asked if he had ever seen his father handling white powder. He replied that there were bags of white powder in his father's car (if they were not in the kitchen cupboard), a white Buick, which was parked around the corner. The boy then led the officers to the car, where they opened it with keys taken from the house, and discovered 40 bundles of heroin and other narcotics paraphernalia (Suppression Hearing Tr. 104-106, 108-109, 122, 127-129).[2]

[2]The Fifth Circuit had occasion in a companion case to discuss in detail the facts relating to the searches of Hill's home and automobile. See *United States* v. *Hill*, 500 F.2d 315; Pet. App. C. This Court recently denied co-defendant Hill's petition for a writ of certiorari in that case (No. 74-5512, certiorari denied, February 18, 1975). Following affirmance of his conviction in the instant case (508 F.2d 345), Hill again raised questions relating to the searches in his petition for a writ of certiorari which is now pending before this Court (No. 74-6202; see Memorandum for the United States in Opposition, p. 5, n. 7).

Petitioner lacks standing to challenge the search of co-defendant Clarence Hill's car and the questioning of Hill's son. He was not present at the time of the search, he has demonstrated no proprietary or possessory interest in the automobile, he was not charged with an offense requiring possession, and it was not his son who was questioned. See *Brown* v. *United States*, 411 U.S. 223. The mere fact that petitioner was a co-defendant and co-conspirator of one whose Fourth Amendment rights allegedly were invaded does not confer standing upon him to complain of an unlawful search and seizure. *Brown* v. *United States, supra; Alderman* v. *United States*, 394 U.S. 165; *United States* v. *Frick*, 490 F.2d 666 (C.A. 5), certiorari denied *sub nom. Peterson* v. *United States*, 419 U.S. 831; *United States* v. *Howell*, 470 F.2d 1064 (C.A. 9); *United States* v. *Bell*, 457 F.2d 1231, 1239 (C.A. 5); *United States* v. *Goldenstein*, 456 F.2d 1006 (C.A. 8); *United States* v. *Price*, 447 F.2d 23 (C.A. 2), certiorari denied, 404 U.S. 912; *United States* v. *Humphrey*, 409 F.2d 1055 (C.A. 10).[3]

Assuming, *arguendo*, that petitioner has standing to contest the search and seizure, the court of appeals properly concluded that the warrantless seizure of the heroin from co-defendant Hill's automobile was reasonable. The validity of the search and seizure is addressed in our Memorandum in Opposition in *Hill* v. *United States*, No. 74-6202, certiorari pending (*supra*, note 2), upon which we rely.[4]

[3]Petitioner's argument is addressed to the propriety of obtaining from a suspect's minor child information incriminating the parent. Petitioner contends that such a procedure is fundamentally offensive and in derogation of privacy rights secured by the Constitution. Even if the proposition petitioner advances were correct, petitioner has no standing to raise the issue since the alleged rights derive from the parent-child relationship. In this case petitioner can, of course, assert no parental interest.

[4]A copy of our opposition in *Hill* will be sent to petitioner's counsel.

2. Petitioner next contends that the district court erred in not granting a requested mistrial after the prosecutor made the following remarks during closing argument:

> I want to thank you * * * for your attentiveness that you have shown over the last three days. You have done your duty as a jury. I have noticed you as you have watched attentively, listen [*sic*] to the witnesses, observed the witnesses' demeanor, observed the defendants' demeanor and everything that went on in the courtroom * * * [Tr. 488].
>
> * * * * *
>
> I submit to you that even an act as innocent as the sending of a money order is an overt act in furtherance of the conspiracy, because there is only one logical conclusion that you can draw from the evidence that's been presented, that the only reason that the money order was sent, you have heard no other reason for the money order to be sent, was that it was to purchase heroin with, heroin from the streets of New York City to be distributed here in the Eastern District of Louisiana, here on the streets of New Orleans. There is no other evidence presented, other than the association between these three individuals was for anything, but to distribute heroin [Tr. 491-492].
>
> * * * * *
>
> Thus, ladies and gentlemen, through that evidence that you heard from the witness stand, upon your oath to truly consider the evidence presented, the Government submits that you must return upon the only evidence presented, that there was a conspiracy between Clarence Hill, Julius Wilkerson, Clarence Diggs and Joyce Banks Picard, Cora Virgil, Barbara Smith,

> the other conspirators named and upon the evidence presented that you will return the only true and just verdict, that of guilty as charged [Tr. 500].

At the conclusion of the prosecutor's argument, petitioner moved for a mistrial on the grounds that the remarks prejudiced the jury by referring to petitioner's failure to testify; the motion was denied (Tr. 501-502). During its instructions to the jury, the court apprised the jury that the defendants were under no obligation to testify or offer evidence and that no adverse inference could be drawn from a defendant's failure to testify (Tr. 561).

Petitioner complains that the initial remarks of the prosecutor, thanking the jury for its attentiveness, were prejudicial because the prosecutor thereby called attention to the defendants' demeanor during trial. Juries undoubtedly do observe the demeanor of defendants during trial, whether or not they testify. A prosecutor's observation to this effect, without more, cannot reasonably be construed as a comment upon a defendant's failure to testify. Moreover, the court of appeals expressly found that there was no showing of prejudice to petitioner in the circumstances of this case and stated that "the remark was no doubt taken as manifestly it was intended, as meaningless flattery to the jury upon its alert attention to all that happened before it" (Pet. App. A 47).

With respect to the other allegedly prejudicial remarks, the court of appeals correctly observed (Pet. App. A 46-47):

> * * * [These] remarks could only have been understood as comments on the failure of the *defense* (as opposed to *defendants*) to counter or explain the testimony of the unindicted co-conspirators, the various police officials, and the prosecution's other witnesses

> and exhibits, putting a mass of incriminating evidence before the jury. None of these three remarks specifically pointed to any or all of the defendants as not having testified. Indeed, we can find no specific reference to defendants' failure to take the stand during the trial in the record. The judge told the jury that the defendants did not have to testify and need not offer evidence. * * * None of the statements are comparable to the prejudicial remarks and instructions that resulted in reversal of trial convictions in *Fontaine* v. *California*, 390 U.S. 593 * * *, and in *Griffin* v. *California*, 380 U.S. 609 * * * [emphasis in original].

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.